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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

D. ELIZABETH MARTIN, Plaintiff and Appellant, v. COUNTY OF ORANGE, Defendant and Respondent.	G041600 (Super. Ct. No. 30-2008-00112140) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frederick Paul Horn, Judge. Affirmed.

Richard L. Spix for Plaintiff and Appellant.

Nicholas S. Chrisos, County Counsel, and Marianne Van Riper, Senior Deputy County Counsel, for Defendant and Respondent.

* * *

D. Elizabeth Martin, through counsel Richard L. Spix, filed a petition for writ of mandate pursuant to the California Public Records Act (Gov. Code, § 6250 et seq.). Martin sought a writ of mandate commanding the County of Orange (County) to produce approximately 260 e-mail documents it had previously refused to produce in a separate civil action and instead had catalogued on a privilege log. The trial court denied the petition in its entirety and entered judgment against Martin. Martin appeals and we affirm.[1] The documents sought are protected from disclosure by the attorney-client privilege.

FACTS

The court's denial of the petition was not the worst thing that happened to Martin and Spix at the hearing. The court expressed its preliminary view that it appeared the pair had engaged in "a deceptive scheme to obtain documents protected by the attorney-client privilege without notifying either the attorney or the client that the documents [were] being sought."

Early in 2008, a case had been filed by Orange County Fair Housing Council (Fair Housing Council), a nonprofit California corporation, against D. Elizabeth Pierson. In the course of defending the lawsuit, Pierson (represented by the firm of Parker, Milliken, Clark, O'Hara & Samuelian) served a subpoena in July 2008 on Herm Perlmutter and the County's Health Care Agency (Health Care Agency) seeking a variety of documents pertaining to Fair Housing Council and its directors. Perlmutter, a Health Care Agency employee, also was a Fair Housing Council director. Perlmutter stored and maintained documents pertaining to the Fair Housing Council board, some consisting of communications with the Fair Housing Council's attorney, on his County work computer,

[1] We grant Martin's two motions to augment the record and her request for judicial notice.

as he used his work e-mail address (with the permission of the County) to correspond with regard to Fair Housing Council business.

Fair Housing Council attorney Deborah Reisdorph claimed some of the documents in the possession of the County were subject to the attorney-client privilege. Reisdorph reviewed the documents and identified 260 pages as privileged. The County withheld these documents from its otherwise responsive production to Pierson and provided a privilege log. The County indicated in a cover letter that it "makes no substantive claim that these documents are privileged. Instead, we are constructing the privilege log as a courtesy to you, to permit you to review the privilege claim of Attorney Reisdorph."

D. Elizabeth Pierson, represented by Parker, Milliken, Clark, O'Hara & Samuelian, moved to compel production of the records on September 15, 2008. The trial court in the Fair Housing Council case denied the motion to compel on October 28, 2008: "The subpoena on its face requested attorney-client privileged documents [and] the documents have been shown to be subject to the attorney-client privilege. Responding party produced a privilege log."

On September 18, 2008, D. Elizabeth Martin, through counsel Richard L. Spix (who is not affiliated with the Parker, Milliken, Clark, O'Hara & Samuelian firm that represents Pierson in the Fair Housing Council action), filed a petition for writ of mandate pursuant to the California Public Records Act (Gov. Code, § 6250 et seq.) seeking the same 260 documents. The petition was deemed related to the Fair Housing Council action and reassigned to Judge Frederick P. Horn.

At the hearing on the petition on December 15, 2008, the court indicated it planned "on setting an O.S.C. on whether D. Elizabeth Martin and/or her attorney, Richard Spix, should be sanctioned or held in contempt for: [¶] One, failing to file a notice of related case . . . ; [¶] Two, failing to notify [Fair Housing Council] or its attorney or Mr. Perlmutter of the pending petition for writ of mandate . . . ; [¶] Three,

failing to notify the court in the related case that Ms. Martin is the same person as Ms. Pierson or that there was a similar motion pending before Judge Horn . . . ; (D); [¶] Four, failing to give notice in the hearing on the petition for writ of mandate for this hearing . . . ; [¶] And five, abuse of process . . . ." The court denied the petition in its entirety and entered judgment against Martin.

DISCUSSION

Before turning to the issue presented, we must first articulate what is not relevant to this appeal — the contempt proceedings against Martin and Spix. Even after a party suffers an unfavorable civil discovery ruling with regard to public documents, that same party may request an inspection of the same public documents under Government Code section 6253 and institute proceedings to enforce inspection rights under Government Code section 6258. (*County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 826.) Thus, putting to one side the apparent procedural (and, perhaps, ethical) shortcomings of Martin's and Spix's legal maneuvering, there was nothing wrong per se with Martin using the California Public Records Act to attempt to obtain documents she was simultaneously trying to obtain in civil discovery.

We also face the preliminary question of whether the court's discovery ruling in the Fair Housing Council case precludes relitigation in this action. Because the right to public records is broader than the right to civil discovery, collateral estoppel based on a prior civil discovery order does not always bar a subsequent California Public Records Act proceeding. (See *County of Los Angeles v. Superior Court*, *supra*, 82 Cal.App.4th at pp. 829-830.) Moreover, it is questionable whether the discovery order in the Fair Housing Council action can be considered "final and on the merits" as that case is still proceeding. The County does not argue in its brief that collateral estoppel or any

other theory precludes this court from examining the merits of this appeal; thus, we will do so.[2]

At issue is the interplay between the California Public Records Act and the attorney-client privilege. Martin asserts the California Public Records Act entitles her to access the documents withheld by the County. "Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so." (Gov. Code, § 6253, subd. (b).) "'Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (Gov. Code, § 6252, subd. (e).)

The County claims it was entitled to refrain from producing the documents at issue until it was ordered to do so by a court. "[T]he *client, whether or not a party*, has a privilege to refuse to disclose, *and to prevent another from disclosing,* a confidential communication between client and lawyer . . . ." (Evid. Code, § 954, italics added.) The California Public Records Act does not require disclosure of records "the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." (Gov. Code, § 6254, subd. (k).) Here, Fair Housing Council, through its attorney Reisdorph, asserted certain

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[2] The County's position, in large measure, remains that it does not have an interest at stake in this litigation and only wishes to avoid entangling itself in illegality. This raises the concern that Fair Housing Council, the party that asserted the privilege, is not adequately represented in this appeal (a similar concern motivated the court when it instituted contempt proceedings against Martin and Spix). Fair Housing Counsel is a party to one lawsuit with Martin, but is not a party here and has not attempted to intervene in this case. As we agree with the court's order on the merits, we need not concern ourselves with the dearth of vigorous advocacy in support of the court's order.

documents in the possession of the County were Fair Housing Council's privileged communications. Thus, Fair Housing Council exercised its privilege to prevent the County from disclosing attorney-client communications. The County, without taking a substantive position on whether the documents were privileged pending a court's determination of the issue, honored Fair Housing Council's request by withholding the specified documents and cataloging the documents it withheld on a privilege log.

Martin's primary argument is that there was no reasonable expectation of privacy for any e-mail sent to or by Perlmutter, who used a County e-mail address, and therefore any claim of privilege by Fair Housing Council is waived. The County has the following policy with regard to its employees' use of County information technology resources: "All information created, sent, or received via the e-mail system, network, Internet, telephones or the Intranet is the property of the County. Employees should not have any expectation of privacy regarding such information. This includes all e-mail messages and all electronic files." Moreover, Martin argues that by turning over his documents to his superiors after the subpoena was served, Perlmutter waived the privilege. Martin also argues that, regardless of whether the documents were privileged, the County cannot selectively release documents in its possession to anyone, including the asserted holder of the privilege, and then withhold the documents from the public.

The courts (in both this action and the Fair Housing Council action) found the County's actions in withholding Fair Housing Council's privileged documents to be appropriate. We agree. The Fair Housing Council did not waive its attorney-client privilege by communicating with one of its directors, Perlmutter, on his county e-mail address. The County was justified in waiting for guidance from a court before turning over documents claimed to be privileged by a third party.

"A communication between persons in [a lawyer-client relationship] does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic

communication may have access to the content of the communication." (Evid. Code, § 917, subd. (b).) This statute precludes an argument that the County's mere ability to access Perlmutter's e-mail account waives the privilege. As Evidence Code section 917 recognizes, the use of electronic communication often entails entities or individuals outside the privileged relationship having access to such communications. Notwithstanding this reality, Evidence Code section 917 endorses the applicability of statutory privileges to e-mail.

The question of whether (and in what circumstances) individuals can forfeit *their own* privilege rights when they communicate with their attorney using an employer-issued computer and/or e-mail address is not settled in California. Other states have begun to explore this important issue. (See, e.g., *Stengart v. Loving Care Agency, Inc.* (2009) 408 N.J. Super. 54, 73-75 [attorney-client privilege trumps written employer policy purporting to provide for complete employer access and ownership of all electronic communications made on its equipment]; *Scott v. Beth Israel Medical Center Inc.* (2007) 847 N.Y.S.2d 436, 441-444 [employer e-mail policy prohibiting all personal use and allowing employer monitoring of employee's e-mails eliminates any expectation of privacy and therefore precludes claim of privileged communication].)

But we need not address this question to resolve this case. Here, Perlmutter is not the holder of the privilege. He is a director of Fair Housing Council, a non-profit corporation. Fair Housing Council is the holder of the privilege. Fair Housing Council and its attorney did not waive the attorney-client privilege by communicating with an individual director whose "contractual" obligations with his employer could arguably entail his waiver of privileges with regard to e-mails sent and received at his company e-mail address. Perlmutter was never the holder of the privilege (the client) and could never therefore unilaterally waive Fair Housing Council's privilege rights. (See Evid. Code, § 912, subd. (a); *Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96, 105 ["Here, there is no dispute that the defendants in their individual capacities as

directors, officers, and majority shareholders were not the clients of VLG and Giesler. Since they were not clients, the individual defendants cannot impliedly waive the attorney-client privilege that attached to their confidential communications with VLG and Giesler on behalf of Soft Plus by asserting the advice of counsel defense"]; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 652-654 [attorney's inadvertent disclosure of privileged material does not waive holder's privilege].)

DISPOSITION

The judgment is affirmed. The County shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.